

DRAFT PURPOSES ONLY

**EXECUTIVE ORDER
NUMBER THIRTY-ONE**

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES

RE: IMPROVING ACCESS TO PUBLIC RECORDS THROUGH UNIFORM
PROCEDURES FOR FREEDOM OF INFORMATION ACT REQUESTS

WHEREAS, it is the policy of this State and this administration that the business of government be performed in an open and public manner so that citizens can "observe the performance of public officials" and "monitor the decisions that are made by such officials in formulating and executing public policy," 29 DEL. C. § 10001, and that policy is guaranteed and implemented by the Freedom of Information Act, 29 DEL. C. ch. 100 (the "Act" or "FOIA"); and

WHEREAS, access to public records is a vital component of FOIA, and public bodies are instructed by the Act to develop policies and rules to implement its provisions faithfully; and

WHEREAS, in the thirty years since the Act became law, executive branch agencies have enacted their own policies to implement the Act, and, over time, those policies have evolved and been amended as the needs of each agency required; and

WHEREAS, as a result of those amendments, the policies of executive branch agencies now differ substantially from one another, leading to inconsistencies and disparities in the implementation of FOIA across agencies; and

WHEREAS, after a comprehensive review of executive branch agency policies, I have concluded that it is in the best interest of the citizens of this State that uniform FOIA policies be implemented by each executive branch agency, and that such uniform policies would help reduce the inconsistencies and differences across agencies while promoting access to public records; and

WHEREAS, standardized FOIA policies for executive branch agencies will also help aid in the implementation of Senate Bill No. 87, which requires the Attorney General to promulgate a standard form by which FOIA requests can be made; and

WHEREAS, a more uniform FOIA policy should help reduce the time and expense of making a FOIA request, and can do so by reducing the copying costs charged

by the agency and ensuring that agencies collaborate to ensure that records are produced even when the request is made to the wrong agency; and

NOW, THEREFORE, I, JACK A. MARKELL, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. All executive branch agencies shall implement and promulgate a policy for addressing requests made under the Freedom of Information Act substantially in the form attached hereto as Exhibit A. Executive branch agencies shall adopt such policy and rescind any existing FOIA policy no later than February 1, 2012.

2. All executive branch agencies shall develop a web portal for receiving FOIA requests through the Internet. Such portals shall utilize the standard request form required pursuant to Senate Bill No. 87 and promulgated by the Attorney General, and shall be available for use on Delaware.gov on or before December 1, 2011.

3. All executive branch agencies are reminded of their duty to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access, and that all records held by the agency are "public records" to which the public should have access unless they fall within the scope of an enumerated exception in 29 DEL. C. § 10002(g).

4. Agencies of state and local government outside the executive branch are encouraged to reevaluate their FOIA policies and consider whether, in light of Senate Bill No. 87, evolving technology, or recent FOIA authority, their policies might be updated or amended to improve access to public records and potentially standardize the procedures by which requests for public records are made.

5. This Executive Order is a directive from the Governor to Executive Branch agencies. It is not intended to and shall not create independent causes of action for or on behalf of persons who allege a lack of compliance with the Order.

**APPROVED this 20th day of October,
2011**

Governor

ATTEST:

Secretary of State

EXHIBIT A

Uniform Policy Regarding FOIA Requests

1.0 Definitions

The following words and terms, when used in this policy, shall have the following meaning unless the context clearly indicates otherwise:

“Agency” means _____.

“FOIA” means the Freedom of Information Act as established pursuant to Title 29, Chapter 100 of the Delaware Code.

“FOIA Coordinator” shall mean the person designated by the Secretary to receive and process FOIA Requests.

“FOIA Request” or “Request” means a request to inspect or copy Public Records pursuant to Chapter 29, Section 10003 of the Delaware Code and in accordance with the policy hereunder.

“FOIA Request Form” means the form promulgated by the Office of the Attorney General upon which requests for Public Records may be made.

“Non-Custodial Records” shall have the meaning set forth in Section 3.6.

“Public Record” shall have the meaning set forth in 29 *Del. C.* §10002.

“Requesting Party” shall mean the party filing a FOIA Request.

“Secretary” means the Secretary of _____.

2.0 Purpose

The purpose of this policy is to set forth the rules and procedures for responding to requests from the public for Public Records under Title 29, Chapter 100 of the Delaware Code, the Freedom of Information Act.

Agency employees are reminded that all Public Records requested under FOIA shall be considered open and subject to disclosure to the Requesting Party, and any information therein may be withheld only if a specific exception applies. Exceptions shall be construed in a manner that shall further the accountability of the Agency and to comply with the policy that the public shall have reasonable access to Public Records.

3.0 Records Request, Response Procedures and Access

3.1. Form of Request

3.1.1. All FOIA Requests shall be made in writing to the Agency in person, by email, by fax, or online in accordance with the provisions hereunder. FOIA Requests may be submitted using the FOIA Request Form promulgated by the Office of the Attorney General; provided, however, that any FOIA Request that otherwise conforms with the policy hereunder shall not be denied solely because the request is not on the promulgated form. Copies of the FOIA Request Form may be obtained from the Agency’s website, or from the office or website of any state agency.

3.1.2. All requests shall adequately describe the records sought in sufficient detail

to enable the Agency to locate such records with reasonable effort. The Requesting Party shall be as specific as possible when requesting records. To assist the Agency in locating the requested records, the Agency may request that the Requesting Party provide additional information known to the Requesting Party, such the types of records, dates, parties to correspondence, and subject matter of the requested records.

3.2. Method of Filing Request

3.2.1.1. FOIA Requests may be made by mail or in person to the FOIA Coordinator at _____, by email to _____, by fax at _____; or via online request form, which may be found on the Agency's home page at _____.

3.3. FOIA Coordinator

3.3.1. The Secretary shall designate a FOIA Coordinator, who shall serve as the point of contact for FOIA Requests and coordinate the Agency's responses thereto. The FOIA Coordinator shall be identified on the Agency's website. The FOIA Coordinator may designate other Agency employees to perform specific duties and functions hereunder.

3.3.2. The FOIA Coordinator and/or his or her designee, working in cooperation with other Agency employees and representatives, shall make every reasonable effort to assist the Requesting Party in identifying the records being sought, and to assist the Agency in locating and providing the requested records. The FOIA Coordinator and/or his or her designee will also work to foster cooperation between the Agency and the Requesting Party. Without limitation, if a Requesting Party initiates a FOIA Request that would more appropriately be directed to another agency, the FOIA Coordinator shall promptly forward such request to the relevant agency and promptly notify the Requesting Party that the request has been forwarded. The Agency may close the initial request upon receipt of a written confirmation from the FOIA Coordinator of the relevant agency that the relevant agency has received such request. The Agency shall provide the Requesting Party with the name and phone number of the FOIA Coordinator of the relevant agency.

3.3.3. In addition to the foregoing responsibilities, beginning on January 1, 2012, the FOIA Coordinator shall maintain a document tracking all FOIA Requests for the then-current calendar year. For each FOIA Request, the document shall include, at a minimum: the Requesting Party's contact information; the date the Agency received the Request; the Agency's response deadline pursuant to §3.4; the date of the Agency's response pursuant to §3.4 (including the reasons for any extension pursuant to §3.4.1); the names, contact information and dates of correspondence with individuals contacted in connection with requests pursuant to §§3.3.2, 3.5 and 3.6; the dates of review by the Agency pursuant to §3.7 and the names of individuals who conducted such reviews; whether documents were made available; the amount of copying and/or administrative fees assessed; and the date of final disposition.

3.4. Agency Response to Requests

3.4.1. The Agency shall respond to a FOIA Request as soon as possible, but in any event within fifteen (15) business days after the receipt thereof, either by providing access to the requested records; denying access to the records or parts of them; or by advising that

additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived. If access cannot be provided within fifteen (15) business days, the Agency shall cite one of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.

3.4.2. If the Agency denies a request in whole or in part, the Agency's response shall indicate the reasons for the denial. The Agency shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.

3.5. Requests for Email

3.5.1. Requests for email records shall be fulfilled by the Agency from its own records, if doing so can be accomplished by the Agency with reasonable effort. If the Agency determines that it cannot fulfill all or any portion of such request, the Agency shall promptly request that the Department of Technology and Information ("DTI") provide the email records to the Agency. Upon receipt from DTI, the Agency may review the email records in accordance with § 3.7 hereunder.

3.5.2. Before requesting DTI to provide email records, the Agency shall provide a written cost estimate from DTI to the Requesting Party, listing all charges expected to be incurred by DTI in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

3.6. Requests for Other Non-Custodial Records

3.6.1. If all or any portion of a FOIA Request seeks records controlled by the Agency but that are either not within its possession or cannot otherwise be fulfilled by the Agency with reasonable effort from records it possesses (collectively, the "Non-Custodial Records"), then the Agency shall promptly request that the relevant public body provide the Non-Custodial Records to the Agency. Prior to disclosure, records may be reviewed in accordance with §3.7 hereunder by the Agency, the public body fulfilling the request, or both. Without limitation, Non-Custodial Records shall include budget data relating to the Agency.

3.6.2. Before requesting any Non-Custodial Records, the Agency shall provide a written cost estimate to the Requesting Party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

3.7. Review by Agency

3.7.1. Prior to disclosure, records may be reviewed by the Agency to ensure that those records or portions of records deemed non-public may be removed pursuant to 29 *Del. C.* §10002(g) or any other applicable provision of law. In reviewing the records, all documents shall be considered Public Records unless subject to one of the exceptions set forth in 29 *Del. C.* §10002(g) or any other applicable provision of law. Nothing herein shall prohibit the Agency from disclosing or permitting access to Public Records if the Agency determines to disclose such records, except where such disclosure or access is otherwise prohibited by law or regulation.

3.8. Hours of Review

3.8.1. The Agency shall provide reasonable access for reviewing Public Records during regular business hours.

4.0 Fees

4.1. Photocopying Fees

4.1.1. In instances in which paper records are provided to the Requesting Party, photocopying fees shall be as follows:

4.1.1.1. Standard Sized, Black and White Copies: The first 20 pages of standard sized, black and white copied material shall be provided free of charge. The charge for copying standard sized, black and white Public Records for copies over and above 20 shall be \$0.10 per sheet (*i.e.*, \$0.10 for a single-sided sheet, \$0.20 for a double-sided sheet). This charge applies to copies on the following standard paper sizes: 8.5" x 11"; 8.5" x 14"; and 11" x 17".

4.1.1.2. Oversized Copies/Printouts: The charge for copying oversized Public Records shall be as follows:

18" x 22": \$2.00 per sheet

24" x 36": \$3.00 per sheet

Documents larger than 24" x 36": \$1.00 per square foot

4.1.1.3. Color Copies/Printouts: An additional charge of \$1.00 per sheet will be assessed for all color copies or printouts for standard sized copies (8.5" x 11"; 8.5" x 14"; and 11" x 17"), and \$1.50 per sheet for larger copies.

4.2. Administrative Fees

4.2.1. Administrative fees shall be levied for requests requiring more than one hour of staff time to process. Charges for administrative fees may include staff time associated with processing FOIA Requests, including, without limitation, (a) identifying records; (b) monitoring file reviews; and (c) generating computer records (electronic or print-outs). Administrative fees shall not include any cost associated with the Agency's legal review of whether any portion of the requested records is exempt from FOIA. The Agency shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonably required to process FOIA Requests. In connection therewith, the Agency shall minimize the use of non-administrative personnel in processing FOIA Requests, to the extent possible.

4.2.2. Prior to fulfilling any request that would require a Requesting Party to incur administrative fees, the Agency shall provide a written cost estimate of such fees to the Requesting Party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the Requesting Party may decide whether to proceed with, cancel or modify the request.

4.2.3. Administrative fees will be billed to the Requesting Party per quarter hour. These charges will be billed at the current hourly pay grade (pro-rated for quarter hour increments) of the lowest-paid employee capable of performing the service. Administrative fees will be in addition to any other charges incurred under this Section 4, including copying fees.

4.2.4. When multiple FOIA Requests are submitted by or on behalf of a Requesting Party in an effort to avoid incurring administrative charges, the Agency may in its discretion aggregate staff time for all such requests when computing fees hereunder.

4.3. Microfilm and/or Microfiche Printouts: The first 20 pages of standard sized, black and white material copied from microfilm and/or microfiche shall be provided free of charge. The charge for microfilm and/or microfiche printouts over and above 20 shall be \$0.15 per sheet.

4.4. Electronically Generated Records: Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including but not limited to DVD, CD, or other electronic storage costs) and administrative costs.

4.5. Payment

4.5.1. The Agency may require all fees to be paid prior to any service being performed hereunder.

4.5.2. The Agency may require pre-payment of all fees prior to fulfillment of any request for records hereunder.

4.6. Waiver of Fees Pursuant to Prior Policy

4.6.1. Notwithstanding anything herein to the contrary, if any executive branch agency subject to this policy had a FOIA policy in effect as of October 20, 2011, and such policy included a waiver of any copying or administrative fees (*i.e.*, for non-profit organizations or members of the media), then such agency shall have the right (but not the obligation) to continue such waiver of fees.

4.7. Appointment Rescheduling or Cancellation: Requesting Parties who do not reschedule or cancel appointments to view files at least one full business day in advance of the appointment may be subject to the charges incurred by the Agency in preparing the requested records. The Agency shall prepare an itemized invoice of these charges and provide the same to the Requesting Party for payment.

5.0 Applicability

5.1. To the extent any provision in this policy conflicts with any other law or regulation, such law or regulation shall control, and the conflicting provision herein is expressly superseded.

6.0 Agency-Specific Provisions

7.0 Effective Date

This policy shall become effective immediately.